

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE EMERGENCY MEDICAL SERVICES REGULATORY BOARD

In the Matter of Jared J. Fiege, EMT
Applicant Certificate 933245

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Ann O'Reilly on December 10, 2013. The hearing record closed at the end of the hearing.

Gregory J. Schaefer, Assistant Attorney General, appeared on behalf of the Complaint Review Panel (Panel) of the Emergency Medical Services Regulatory Board (Board). Andrew Garvis, Koch & Garvis, L.L.C., appeared on behalf of Appellant Jared Fiege (Fiege).

STATEMENT OF THE ISSUES

1. Did the Panel properly refuse to renew Fiege's Emergency Medical Technician (EMT) certification under Minn. Stat. § 144E.28, subd. 5(a)(3), based upon Fiege's conviction for felony Theft?
2. Did the Panel properly refuse to renew Fiege's EMT certification under Minn. Stat. § 144E.28, subd. 5(a)(3), based upon Fiege's conviction for misdemeanor Careless Driving?
3. Did Fiege engage in unethical conduct, including, but not limited to, conduct likely to deceive, defraud, or harm the public? If so, did the Panel properly refuse to renew Fiege's EMT certification for such conduct pursuant to Minn. Stat. § 144E.28, subd. 5(a)(5)?
4. Did Fiege engage in unprofessional conduct or any conduct which has the potential for causing harm to the public? If so, did the Panel properly refuse to renew Fiege's EMT certification for such conduct pursuant to Minn. Stat. § 144E.28, subd. 5(a)(8)?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that the Panel properly refused to renew Fiege's EMT certification. Pursuant to Minn. Stat. § 144E.28, subd. 5(a)(3), (5), and (8), the Board may refuse to renew an EMT certification based upon a felony conviction, unethical conduct, and unprofessional conduct. The Panel established that Fiege engaged in unethical and unprofessional conduct that defrauded and harmed the public when he stole emergency services equipment during the course of his employment as a certified EMT. This conduct resulted in a felony Theft conviction for which Fiege is still on probation.

Because the felony Theft conviction provides sufficient basis for the Panel's refusal to renew the certification, it is unnecessary to reach the issue of whether Fiege's subsequent conviction for misdemeanor Careless Driving serves as an independent basis for the disciplinary action.

It is, therefore, respectfully recommended that the Board **AFFIRM** the Panel's decision to deny the renewal of Fiege's EMT certification.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Fiege has been certified as an EMT since 2006.¹
2. In 2010, Fiege was employed by North Memorial Ambulance – Brainerd (North Memorial) as a certified EMT.²
3. From July 7 through September 14, 2010, Fiege stole eight radios and six Emergency Medical Service (EMS)/firefighter helmets from North Memorial and attempted to sell the equipment on Ebay, a national sales website.³ The value of the items stolen was estimated to exceed \$5,000.⁴
4. On September 16, 2010, Fiege was charged with one count of felony Theft, in violation of Minn. Stat. § 609.52, subds. 2(1) and 3(2).⁵
5. Fiege claims that he sent a letter to the Board on September 20, 2010, advising it of the felony Theft charge and his responsibility for the offense.⁶ The Board

¹ Testimony of Jared Fiege.

² *Id.*

³ Ex. 1.

⁴ *Id.*

⁵ *Id.*

⁶ Ex. 103; Test. of J. Fiege.

denies that it received the letter in 2010, but does not dispute that Fiege disclosed the charges to the Board in a timely fashion.⁷

6. On September 23, 2010, as a result of the thefts, North Memorial terminated Fiege's employment.⁸ North Memorial also filed a Complaint/Report (Report) with the Board.⁹

7. The Board assigned the Report for investigation on September 29, 2010.¹⁰

8. After being fired from North Memorial, Fiege applied to Lake County Ambulance (Lake County) for an EMT position.¹¹ Fiege asserts that he disclosed his felony Theft charge to Lake County.¹² Fiege was hired, worked two shifts, and was terminated.¹³

9. On December 12, 2011, the Panel met to discuss the Investigation Report related to Fiege.¹⁴ The Board took no action against Fiege's EMT certification at that meeting because the investigation and the criminal charges were pending.¹⁵

10. EMT certifications must be renewed every two years by March 31 of the year of expiration.¹⁶ Fiege's EMT certification was set to expire on March 31, 2011.¹⁷

11. On March 1, 2011, Fiege applied for recertification with the Board.¹⁸ Fiege did not note any felony convictions in his application.¹⁹

12. Because the felony Theft charge was still pending and because Fiege had not yet been convicted of the offense, the Board renewed Fiege's EMT certification through March 31, 2013.²⁰

13. Once Fiege's EMT certification was renewed, he applied for a job with the Rochester Fire Department (Rochester).²¹ This position required him to hold a valid

⁷ Test. of Rose Olson. Olson testified that she first saw Fiege's letter (dated September 20, 2012) when Fiege's attorney submitted it with some correspondence to the Board on June 5, 2013.

⁸ Ex. 1

⁹ *Id.*

¹⁰ *Id.*

¹¹ Test. of J. Fiege.

¹² *Id.*

¹³ *Id.*

¹⁴ Ex. 123.

¹⁵ Test. of R. Olson.

¹⁶ *Id.* See also, Minn. Stat. § 144E.28, subds. 2 and 3.

¹⁷ Test. of R. Olson.

¹⁸ Ex. 2.

¹⁹ *Id.*

²⁰ Test of R. Olson.

²¹ Test. of J. Fiege.

EMT certification.²² Rochester interviewed Fiege and offered him a job contingent upon a criminal background check.²³ Rochester later rescinded its job offer to Fiege.²⁴

Felony Theft Conviction

14. On October 3, 2011, Fiege pleaded guilty to felony Theft in Crow Wing County District Court.²⁵ Fiege was sentenced to five years of probation and two days in jail.²⁶ Fiege was also ordered to pay a \$500 fine and \$5,945.00 in restitution.²⁷ Fiege paid the fine and restitution within days of his conviction.²⁸

15. The Board completed its investigation into the Report filed by North Memorial on December 1, 2011, and advised the Panel of Fiege's criminal conviction.²⁹ The Panel met on December 12, 2011.³⁰ The Panel discussed the results of the investigation and the various disciplinary options available to the Board.³¹ The Panel members were unable to reach a consensus as to the form of discipline to impose and decided to defer the matter for further consideration.³²

Misdemeanor Careless Driving Conviction

16. On February 18, 2012, Fiege operated a motor vehicle in Washington County, Minnesota, and was stopped on suspicion of driving while intoxicated.³³ Fiege consented to a breath test, which showed he had a blood alcohol concentration (BAC) of 0.10.³⁴ The legal limit for operating a motor vehicle in Minnesota at the time was 0.08.³⁵ As a result of his BAC concentration, Fiege's driver's license was revoked for 90 days.³⁶

17. Fiege was charged with the misdemeanor offenses of Careless Driving; Operating a Motor Vehicle with an Alcohol Concentration of 0.08 or More Within Two Hours; and Failure to Keep Right.³⁷

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Ex. 1.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ex. 1.

³⁰ Ex. 123; Test. of R. Olson.

³¹ Test. of R. Olson.

³² *Id.*

³³ Ex. 3; Test. of J. Fiege.

³⁴ *Id.*

³⁵ Minn. Stat. § 169A.20 (2012).

³⁶ Ex. 3

³⁷ Ex. 3. Failure to Keep Right is a petty misdemeanor offense.

18. Fiege admits that on February 18, 2012, he had attended a concert in the Twin Cities, where he consumed alcoholic beverages.³⁸ After returning to the hotel, Fiege suffered heartburn and drove to a drug store to get some medication.³⁹ On his way to the drug store, the police stopped Fiege and arrested him for driving while under the influence of alcohol.⁴⁰ Fiege concedes that the test of his breath indicated a BAC which exceeded the legal limit.⁴¹

19. On May 9, 2012, Fiege pleaded guilty to misdemeanor Careless Driving, in violation of Minn. Stat. § 169.13, subd. 2.⁴² The remaining charges, including the alcohol-related offense, were dismissed.⁴³ Fiege was sentenced to 90 days of jail stayed for a period of one year.⁴⁴ Fiege was placed on probation for a period of one year on the condition that he complete a chemical dependency evaluation, attend a Mothers Against Drunk Driving (MADD) Victim Impact Panel, pay a fine of \$500, and have no same or similar offenses.⁴⁵ Fiege completed a chemical dependency evaluation which determined that he did not meet the criteria for treatment.⁴⁶

20. The Panel met again on September 17, 2012, and discussed the Investigation Report related to Fiege's felony Theft conviction.⁴⁷ At the time, however, the Panel had no knowledge of Fiege's alcohol-related arrest and plea to Careless Driving.⁴⁸ Once again, the Panel took no action against Fiege's certification because the Panel was unable to reach a consensus as to the disciplinary action to impose.⁴⁹

Application for Renewal of EMT Certification

21. On March 29, 2013, Fiege applied for renewal of his EMT certification.⁵⁰ In the application, Fiege disclosed his convictions for felony Theft and misdemeanor Careless Driving.⁵¹

22. Based upon the disclosures made in his application for renewal, the Board requested that Fiege complete a "Conviction Questionnaire" related to his Careless Driving conviction.⁵² Fiege filed the completed Questionnaire with the Board on April 4, 2013.⁵³ Fiege admitted that the Careless Driving offense arose out of an alcohol-related

³⁸ Ex. 4

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Ex. 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Ex. 5.

⁴⁷ Ex. 124

⁴⁸ Test. of R. Olson.

⁴⁹ *Id.*

⁵⁰ Ex. 2.

⁵¹ *Id.*

⁵² Ex. 4.

⁵³ Ex. 5.

driving stop in which his BAC tested over the legal limit.⁵⁴ In his disclosures to the Board, Fiege was forthright about the circumstances of the offenses and his convictions.⁵⁵

23. The Panel met on April 22, 2013, and discussed Fiege's application for renewal of his EMT certification.⁵⁶ This time, the Panel decided to deny Fiege's application for renewed certification.⁵⁷

24. Fiege successfully completed probation on the Careless Driving offense on May 8, 2013.⁵⁸ The Careless Driving offense did, however, result in a probation violation in his felony Theft case.⁵⁹ Fiege served an additional 10 days in jail on the felony Theft offense for the probation violation.⁶⁰

25. On May 13, 2013, Fiege sent a letter to the Board explaining the circumstances of his felony Theft and Careless Driving convictions.⁶¹ Fiege expressed that he made "horrible" and "inexcusable" mistakes and requested that the Board give him a "second chance" by renewing his certification.⁶² Fiege enclosed letters of support from emergency services professionals with whom he has worked.⁶³ The letters were complimentary of Fiege's work and character, and urged the Board to renew Fiege's EMT certification.⁶⁴

Panel Decision to Deny Recertification

26. On May 23, 2013, the Board notified Fiege in writing that the Panel met and voted to deny Fiege recertification as an EMT.⁶⁵ The letter noted that the Panel based its decision on Fiege's convictions for felony Theft and Careless Driving "after an Implied Consent test revealed a blood alcohol level of 0.10."⁶⁶ The letter did not specifically allege that Fiege had committed unethical or unprofessional conduct.⁶⁷

27. The Board advised Fiege of a Panel conference scheduled for June 10, 2013, in which the Panel would reconsider Fiege's request for reconsideration of the denial of his application for recertification.⁶⁸ Fiege and his attorney appeared at that

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Ex. 125.

⁵⁷ Test. of R. Olson.

⁵⁸ Ex. 5; Test. of J. Fiege.

⁵⁹ Test. of J. Fiege.

⁶⁰ Test. of J. Fiege.

⁶¹ Ex. 6.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Ex. 7.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ex. 7.

conference.⁶⁹ After hearing from Fiege and his legal counsel, the Panel affirmed its decision to deny the renewal of Fiege's EMT certification.⁷⁰ The Panel advised Fiege that it would not likely issue a certification to Fiege until his felony probation is completed in 2016, despite the fact that Fiege is permitted to reapply after six months by statute.⁷¹

28. On June 25, 2013, the Board advised Fiege of its decision and of his right to a contested case hearing.⁷²

29. Fiege timely requested a hearing in this matter.⁷³

30. On August 28, 2013, the Board served Fiege with a Notice and Order for Prehearing Conference and Hearing (Order).⁷⁴ The Order advised Fiege that the Board denied his application for renewal due to: (1) a conviction for felony Theft; (2) a conviction for "a misdemeanor relating to the illegal use of alcohol"; (3) engaging in unethical conduct; and (4) engaging in unprofessional conduct.⁷⁵ This was Fiege's first notice that the Board was taking action based upon unethical and unprofessional conduct.⁷⁶

31. In 2010, Fiege applied to the St. Paul Fire Department (St. Paul) to be a firefighter.⁷⁷ On November 6, 2013, St. Paul notified Fiege that he could potentially be on the next list of eligible candidates based upon his score on the civil service exam.⁷⁸ However, to qualify for a position with the fire department, Fiege is required to have a valid EMT certification.⁷⁹ In order to be considered for certification on the eligible list, Fiege must present documentation of a valid EMT certification by February 3, 2014.⁸⁰ Therefore, the non-renewal of his certification will result in Fiege being removed from the list of eligible candidates for a position with the St. Paul Fire Department.⁸¹

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

⁶⁹ Ex. 10.

⁷⁰ *Id.*

⁷¹ Ex. 13. See Minn. Stat. § 144E.28, subd. 5(d).

⁷² Ex. 10.

⁷³ Ex. 11.

⁷⁴ Ex. 12.

⁷⁵ See Notice and Order for Prehearing Conference and Hearing on file and of record in this case.

⁷⁶ Test. of J. Fiege.

⁷⁷ Test. of J. Fiege; Ex. 118.

⁷⁸ Ex. 123.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

CONCLUSIONS OF LAW

1. The Board and the Office of Administrative Hearings (OAH) have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50 and 144E.28, subd. 5.⁸²

2. Fiege received due, proper, and timely notice of the bases for the Panel's decision to deny the renewal of Fiege's EMT certification, and of the time and place of the contested hearing.

3. The Panel and the Board has complied with all procedural requirements of rule and law.

4. Pursuant to Minn. Stat. § 144E.28, subd. 5, the Board may deny an EMT certification or refuse to renew an EMT certification for an individual who the Board determines:

(3) is convicted or pleads guilty or nolo contendere to any felony; any gross misdemeanor relating to assault, sexual misconduct, theft, or the illegal use of drugs or alcohol; or any misdemeanor relating to assault, sexual misconduct, theft, or the illegal use of drugs or alcohol;

(5) engages in unethical conduct, including, but not limited to, conduct likely to deceive, defraud, or harm the public or demonstrating a willful or careless disregard for the health, welfare, or safety of the public;

(8) engages in unprofessional conduct or any other conduct which has the potential for causing harm to the public, including any departure from or failure to conform to the minimum standards of acceptable and prevailing practice without actual injury having to be established....

5. The Panel has the burden to establish by a preponderance of the evidence the facts upon which it based its decision to deny Fiege's application for recertification.⁸³

6. The Panel established that Fiege was convicted of felony Theft on October 3, 2011. The criminal offense arose out of Fiege's theft of over \$5,000 worth of

⁸² Unless otherwise noted, all references to Minnesota Statutes and Rules shall be to the 2013 versions of the same.

⁸³ Minn. R. 1400.7300, subp. 5.

emergency medical equipment owned by his employer, North Memorial. Said offense occurred in the course of Fiege's employment as a certified EMT.

7. The Panel established that Fiege, through his felonious actions, engaged in unethical conduct and that conduct defrauded and harmed the public.

8. The Panel further established that Fiege, through his felonious actions, engaged in unprofessional conduct that harmed the public. Fiege's theft of emergency medical equipment from his employer during the course of his work as a certified EMT, departed from, and failed to conform to, the minimum standards of acceptable and prevailing practice for certified EMTs.

9. Fiege's felony conviction, and the unethical and unprofessional conduct associated with that offense, provide sufficient legal and factual basis for the Panel's decision not to renew Fiege's EMT certification. There is no need to address whether Fiege's conviction for misdemeanor Careless Driving provides independent basis for the Panel's action.

Based upon the foregoing Findings of Fact and Conclusions of Law, as detailed in the Memorandum below, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that that the Board **AFFIRM** the Panel's decision to not renew Fiege's EMT certification.

Dated: January 9, 2014

s/Ann O'Reilly

ANN O'REILLY
Administrative Law Judge

Reported: Digitally Recorded; No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Board will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Board shall not make a final decision until this Report has been made available to the parties for at least ten (10) calendar days. The parties may file exceptions to this Report and the Board must consider the exceptions in making a final decision. **However, pursuant to Minn. Stat. § 144E.28, subd. 5(c), the Board must issue its final order within 30 days after receipt of the Administrative Law Judge's Report.** Parties should contact Pam Biladeau, Executive Director of the Emergency Medical Services Regulatory Board, 2829 University Avenue S.E., Suite 310, Minneapolis, MN 55414, (651) 201-2806, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Board, or upon the expiration of the deadline for doing so. The Board must notify the parties and Administrative Law Judge of the date the record closes. If the Board fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Board must then return the record to the Administrative Law Judge within ten (10) working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Board is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Fiege argues that the Panel's decision to deny the renewal of his EMT certification is erroneous or improper on five grounds:

- (1) The Panel is equitably estopped from denying recertification based upon its delay in taking disciplinary action and the representations made to Fiege;
- (2) The Board's failure to impose a disciplinary sanction within one year prohibits the Board from now denying Fiege's re-certification under Minn. Stat. § 214.103;
- (3) The Panel's refusal to renew Fiege's EMT certification is contrary to Minn. Stat. § 364.03, which prohibits disqualification from employment based upon criminal convictions;
- (4) The Panel's actions were arbitrary and capricious when compared with other similarly-situated individuals; and
- (5) Fiege's misdemeanor conviction for Careless Driving did not "relate to" the illegal use of alcohol and, therefore, does not establish a sufficient basis for the Panel's refusal to renew Fiege's certification.

Each of these arguments is addressed below.

1. Equitable Estoppel

Fiege contends that the Panel considered disciplinary action against Fiege based upon his felony Theft conviction in its meetings on December 12, 2011 and September 17, 2012, and that each time, the Panel decided to take "no action." Fiege argues that the Panel's decisions in those meetings to take "no action" equated to a decision to impose no disciplinary sanction as a result of his felony conviction. Fiege asserts that he relied to his detriment upon the Board's inaction and, as a result, the Board is now equitably estopped from denying his renewal application.

Fiege's argument is without support in law or fact.

Estoppel is an equitable doctrine which is not to be freely applied against the government.⁸⁴

⁸⁴ *Brown v. Minnesota Dep't of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985).

However, where wrongful conduct threatens to work serious injustice, and where the public interest would not be unduly frustrated, the courts may impose estoppel to prevent a government agency from taking an enforcement action.⁸⁵

To establish a claim of equitable estoppel, Fiege must show: (1) the Board or its representatives “made specific representations or inducements” to Fiege; (2) Fiege reasonably relied on the representations; and (3) Fiege will be harmed if the claim of estoppel is not allowed.⁸⁶

A party seeking to estop a government agency has a heavy burden of proof.⁸⁷ In addition to establishing that the government “made specific representations or inducements” to the party seeking to invoke estoppel, some element of fault or wrongful conduct must be shown.⁸⁸ Affirmative misconduct, rather than simple inadvertence, mistake, or imperfect conduct is required for estoppel to be applied.⁸⁹

Fiege has failed to establish any of the elements of his equitable estoppel claim. First, the facts do not demonstrate that Rose Olson (Olson), the Board’s Licensing Administrator, or any other representative of the Board, made representations or inducements to Fiege that the complaint against him was dismissed or that the Board decided to impose no disciplinary sanction against him. Fiege testified that he spoke with Olson after he disclosed the felony charge and that Olson told him that the Board would take no action until the criminal matter was completed.⁹⁰ After his conviction, Fiege spoke with Olson again.⁹¹ Fiege stated that he specifically remembered a telephone conversation with Olson in which she told him that the Panel decided to take “no action right now.”⁹² Fiege understood this to mean that the Board would not be taking any action in the future based upon North Memorial’s complaint or conviction.⁹³

Fiege’s interpretation of Olson’s statements was not reasonable. Olson testified that she did not tell Fiege that no action would be taken by the Board.⁹⁴ Olson explained that when a complaint is filed, an investigation is initiated, and the matter remains pending until either: (1) it is formally dismissed by the Panel; or (2) disciplinary action is imposed by the Board.⁹⁵ In both situations, the subject of the complaint is

⁸⁵ *Id.* See also, *Mesaba Aviation Div. v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977); *Minnesota Dep’t of Human Services v. Muriel Humphrey Residences*, 436 N.W.2d 110, 118 (Minn. Ct. App. 1989), review denied (Minn. April 26, 1989); *Rem-Canby, Inc. v. Minnesota Dep’t of Human Services*, 494 N.W.2d 71, 74-75 (Minn. Ct. App. 1993), review denied (Minn. Feb. 25, 1993).

⁸⁶ *Muriel Humphrey Residences*, 436 N.W.2d at 117, citing *Brown*, 368 N.W.2d at 910.

⁸⁷ *Ridgewood Development Co. v. State*, 294 N.W.2d 288, 292-93 (Minn. 1980); *Brown*, 368 N.W.2d at 910.

⁸⁸ *Id.*

⁸⁹ *Mesaba Aviation Div. v. County of Itasca*, 258 N.W.2d 877, 880-881 (Minn. 1977); *In re Westling Mfg., Inc.*, 442 N.W.2d 328, 332 (Minn. Ct. App. 1989), pet. for rev. denied (Minn. Aug. 25, 1989).

⁹⁰ Test. of J. Fiege.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Test. of R. Olson.

⁹⁵ *Id.*

notified in writing of the final decision.⁹⁶ Therefore, Olson notes, she would not have told Fiege that the Board decided to take “no action.”⁹⁷

Moreover, Fiege did not testify that he relied on Olson’s statements to his detriment. Rather, Fiege acknowledged that he remained a certified EMT during the time that the matter was pending before the Panel.⁹⁸ Fiege continued to apply for other jobs that required an EMT certification and his certification remained valid.⁹⁹ In addition, because the disciplinary matter was still pending, all information related to the complaint and investigation remained non-public.¹⁰⁰ Accordingly, Fiege suffered no actual harm or prejudice from the Panel’s delay.

In an argument related to his equitable estoppel claim, Fiege asserts that the Board actually made a final decision in its meetings in December 2011 and September 2012 to take no action against Fiege’s certification. According to Fiege, a decision to take no action is, indeed, a decision, and that decision prevents the Board from later taking alternative adverse action.

Contrary to Fiege’s assertions, the Panel did not decide that no disciplinary action was warranted. Rather, the Panel agreed that disciplinary action was appropriate, but the individual members could not reach a consensus as to the type or severity of sanction to impose.¹⁰¹

The Panel’s decision to defer final action until Fiege’s certification came up for renewal is far different from a decision to impose no sanction at all. An affirmative decision to impose no sanction would indicate that no disciplinary action was warranted and that the complaint was closed. Here, however, the complaint file remained open and no final decision was issued until Fiege applied for recertification. Therefore, the disciplinary action remained pending until the Panel finally denied Fiege’s application for recertification.

The Panel admits that its delay in taking disciplinary action was not ideal. Such delay lead Fiege to believe (reasonably or not) that the Board was not going to impose any sanction for his conduct, and caused Fiege to be in a state of uncertainty for over two years. Fiege, however, suffered no actual prejudice as a result of the delay. During the time that the matter was pending, Fiege remained a certified EMT and was able to seek employment as an EMT.

The fact that Fiege was terminated by Lake County Ambulance and was not hired by the Rochester Fire Department cannot be attributed to the Panel’s delay in taking disciplinary action. Olson credibly testified that she had no contact with Lake

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Test. of J. Fiege.

⁹⁹ *Id.*

¹⁰⁰ Test. of R. Olson.

¹⁰¹ *Id.*

County or Rochester; and that all information regarding the complaint and the Board's investigation remained confidential.¹⁰² A logical explanation for Fiege's difficulty in finding other employment may be the fact that he was terminated from his previous EMT position for a serious theft and that he has two criminal convictions. A criminal background check or reference check would have likely uncovered those negative facts.

Moreover, the difficulty that Fiege is now suffering by not being able to pursue a position on the St. Paul Fire Department is not caused by the delay in the Board's action. Rather, it is the result of Fiege's own misconduct which caused his EMT recertification to be denied. Accordingly, Fiege has failed to establish that the Board's delay in taking immediate disciplinary action has caused him to suffer harm. Fiege has, therefore, failed to establish the elements of his equitable estoppel claim.

2. Minnesota Statutes Section 214.103

Fiege additionally argues that Minn. Stat. § 214.103 required the Board to take disciplinary action within one year, and that the Board's failure to act prohibits the Board from now denying Fiege's renewal. Again, Fiege's argument lacks support in law.

Minnesota Statutes section 214.103, subd. 1a (e), provides that within one year after receiving a complaint regarding a "licensee," a "health-related licensing board" "must resolve or dismiss the complaint unless the board determines that resolving or dismissing the complaint cannot reasonably be accomplished in this time and is not in the public interest."

First, the Board is not a "health-related licensing board" as defined in Minn. Stat. § 214.01, subd. 2. Therefore, section 214.103 is inapplicable in this case. Second, section 214.103, subdivision 1a (f), specifically provides that:

Failure to make notifications or to resolve the complaint within the time established in this subdivision shall not deprive the board of jurisdiction to complete the investigation or to take corrective, disciplinary, or other action against the licensee that is authorized by law. Such a failure by the board shall not be the basis for a licensee's request for the board to dismiss a complaint, and shall not be considered by an administrative law judge, the board, or any reviewing court.

Accordingly, even if the one-year requirement applied, it would not prevent the Board from denying Fiege's application for renewal.

3. Minnesota Statutes Section 364.03

Fiege next argues that Minn. Stat. § 364.03 prohibits the Board from denying the renewal of his certification based upon his criminal record. Again, Fiege's argument fails.

¹⁰² *Id.*

Minnesota Statutes section 364.03, subdivision 1, provides that:

[N]o person shall be...disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.

In determining if a conviction directly relates to the occupation for which the license is sought, the licensing authority shall consider:

- (1) The nature and seriousness of the crime or crimes for which the individual was convicted;
- (2) The relationship of the crime or crimes to the purposes of regulating ...the occupation for which the license is sought;
- (3) The relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.¹⁰³

First, there is no license at issue in this case. An EMT certification is a certification and not a license. Therefore, section 364.03 is not applicable to the Panel's action. Second, even if the statute is applicable to an EMT certification, Fiege's felony conviction relates directly to his position as a certified EMT.

It is undisputed that Fiege was convicted of a felony for stealing emergency services equipment from his employer, for whom Fiege worked as a certified EMT. Such theft occurred in the course of Fiege's employment and related directly to his work as an EMT. Fiege's actions were not only unethical, they were unprofessional. Thus, the conviction upon which the Panel based its decision related directly to the occupation for which re-certification is sought. Accordingly, section 364.03 does not prohibit the Board from denying the renewal of Fiege's EMT certification.

Minnesota Statutes section 364.03, subdivision 3, provides that even if a crime for which a person has been convicted directly relates to the occupation for which a license is sought, the disqualification may be set aside if "the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of...the occupation for which the license is sought." Here, Fiege has failed to present sufficient evidence of rehabilitation. While Fiege pledges never to re-offend, he has not successfully completed his felony probation, and such probation was violated when Fiege was subsequently convicted of Careless Driving -- an offense arising out of an arrest for driving with a BAC in excess of the legal limit.

¹⁰³ Minn. Stat. § 364.03, subd. 2.

It is not for the Administrative Law Judge to substitute her judgment for that of the Panel. So long as the Panel had sufficient legal and factual bases to take the disciplinary action imposed, the Judge must defer to the Panel's decision-making authority.

It is important to note that Fiege has the statutory right to apply to the Board and request reinstatement of his certification after six months from the Board's final decision.¹⁰⁴ The Panel advised Fiege that it would not likely grant recertification until Fiege successfully completes his felony probation, which should occur in 2016.¹⁰⁵ The Panel's representation, however, does not prohibit Fiege from reapplying every six months. With sufficient evidence of rehabilitation and a longer history of good conduct, the Panel is urged to consider Fiege's reinstatement so that he can once again pursue his career as an EMT or firefighter.

4. Stipulated Orders from other Disciplinary Actions

Fiege asserts that the Panel's decision to deny recertification was arbitrary and capricious when compared to discipline previously impose on four other EMTs or first responders. In support of this claim, Fiege provided Stipulation and Orders entered into between the Board and four other individuals.¹⁰⁶ Each of those individuals agreed to the suspension of their certifications, which suspensions were stayed on various conditions.¹⁰⁷ Fiege contends that he is entitled to the same type of disposition (i.e., a stayed suspension).

An agency's decision is not arbitrary and capricious if "a rational connection between the facts found and the choice made has been articulated."¹⁰⁸ The party challenging an agency decision bears the burden of proving that the agency findings are not supported by the evidence in the record.¹⁰⁹

Here, Fiege has failed to demonstrate that the Panel's action lacks support in fact. Minnesota Statutes section 144E.28, subdivisions 4 and 5, specifically permit the Board to refuse to renew an EMT certification based upon a felony conviction and for unethical and unprofessional conduct, as was established by Fiege's undisputed actions. The statute specifically grants the Board the discretion to take action to revoke, suspend, or refuse to renew a certification, or "to impose other limitations or conditions on a person's performance of regulated duties."¹¹⁰ This discretion is left to the Panel and Board, and as long as the exercise of discretion has support in fact, which it does in this case, the Panel's decision is not arbitrary or capricious.

¹⁰⁴ Minn. Stat. 144E.28, subd. 5(d).

¹⁰⁵ Ex. 13.

¹⁰⁶ Exs. 119-122.

¹⁰⁷ *Id.*

¹⁰⁸ *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 120 (Minn. 2009) (quotation omitted).

¹⁰⁹ *Id.* at 118.

¹¹⁰ Minn. Stat. § 144E.28, subd. 4.

The fact that the Board has entered into stipulated orders with others in the past for misconduct different than Fiege's conduct in this case, is irrelevant to the Panel's decision in this case. Each complaint is reviewed on a case-by-case basis and all individual factors are considered when discipline is imposed. Here, the Panel's sanction is based in fact and supported by law. It is not arbitrary or capricious.

5. Careless Driving Conviction

Finally, Fiege argues that the Panel improperly based its decision to deny renewal on Fiege's misdemeanor Careless Driving conviction, and that such offense was not "related to" the illegal use of alcohol or drugs.

Minnesota Statutes section 144E.28, subdivision 5(a)(3), provides that the Board may refuse to renew an EMT certification for an individual who is convicted of, or pleads guilty to, a misdemeanor "relating to...the illegal use of drugs or alcohol." Fiege asserts that although he was charged with having a BAC in excess of 0.08 and tested over the legal limit, his actual conviction was related to his driving conduct, not an illegal use of alcohol.

As set forth above, Fiege's felony Theft conviction, and the unethical and unprofessional conduct associated therewith, provide ample basis for the Panel's decision to deny renewal of Fiege's certification. Therefore, there is no need to reach the question of whether the additional conviction for Careless Driving is, by itself, a proper basis for the disciplinary action imposed.

By Fiege's own admission, he had been drinking before driving and a test of his breath indicated that his BAC exceeded the legal limit. Thus, while Fiege pleaded guilty to what may be considered "a lesser offense" of Careless Driving, the circumstances from which his conviction arose related to his use of alcohol. Whether or not this is sufficient to meet the statutory basis for taking disciplinary action against an EMT certification need not be reached here because Fiege's felony Theft, and the conduct associated therewith, provide sufficient bases for the Panel's decision to deny Fiege's recertification.

Accordingly, it is respectfully recommended that the Board **AFFIRM** the Panel's decision to refuse to renew Fiege's EMT certification at this time. The Board is encouraged to reconsider Fiege's certification once sufficient time has expired to demonstrate rehabilitation and fitness for duty.

A.C.O.